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THE SWISS CONFEDERATION, THE FEDERAL ATTORNEY GENERAL
OF SWITZERLAND, GERARD SAUTEBIN AND BRENT HOLTkamp

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OLIVER HILSENATH, ET AL.,

Plaintiffs,

v.

THE SWISS CONFEDERATION, THE
FEDERAL ATTORNEY GENERAL OF
SWITZERLAND, GERARD SAUTEBIN,
BRENT HOLTkamp,

Defendants.

No. C-07-2782-WHA

E-Filing

MOTION OF DEFENDANTS THE
SWISS CONFEDERATION, THE
FEDERAL ATTORNEY GENERAL
OF SWITZERLAND, GERARD
SAUTEBIN, AND BRENT
HOLTkamp TO STRIKE
PLAINTIFFS' REQUEST TO CLERK
TO ENTER DEFAULT

Date: September 13, 2007
Time: 8:00 a.m.
Courtroom: 9, 19th Floor
Judge: The Hon. William H. Alsup

NOTICE OF MOTION AND MOTION

**TO PLAINTIFFS HANA HILSEN RATH, OLIVER HILSEN RATH, NAMA
HILSEN RATH, LIOR HILSEN RATH, ELLA HOPE HILSEN RATH, ISAIAH
BENJAMIN HILSEN RATH, SAUL NATHANIEL HILSEN RATH, AND THE
LIVING TRUST OF MELANIE AND ANDRE HILSEN RATH, IN PROPRIA
PERSONA:**

PLEASE TAKE NOTICE that on September 13, 2007, at 8:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup, defendants **THE SWISS CONFEDERATION, THE FEDERAL ATTORNEY GENERAL OF SWITZERLAND, GERARD SAUTEBIN and BRENT HOLTkamp** (collectively, the “Swiss Defendants”) will bring on for hearing this motion to strike Plaintiff’s Request to Clerk to Enter Default. The grounds for this motion are as follows: (i) the request fails to establish as required by Federal Rule of Civil Procedure 55(a) that The Swiss Defendants failed to timely respond to the complaint because the Plaintiffs’ own submissions to this Court establish that Plaintiffs have not served the Swiss Defendants with the summons and complaint; (ii) assuming for argument’s sake that Plaintiffs’ bare statement that they served the complaint on the Swiss Defendants on June 4, 2007 is sufficient evidence of service, Plaintiffs’ request for default was filed before the Swiss Defendant’s time to respond would have expired; (iii) even if these other deficiencies were not present, entry of default is not appropriate in this case because the allegations of the complaint establish that this Court lacks subject matter jurisdiction over Plaintiffs’ claims because the Swiss Defendants are immune under Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, et seq., and further establish that Plaintiffs’ claims are barred as a matter of law under the Act of State Doctrine; and (iv) as to defendants Gerard Sautebin and Brent Holtkamp, entry of default also is not appropriate because the Court lacks personal jurisdiction over these defendants. This motion is based on this notice of motion and motion, the memorandum set forth below, the motion to dismiss filed concurrently

herewith, the proposed order filed herewith, such further evidence and argument as may be presented to the Court on this motion, and all of the Court's files and records in this action.

The Swiss Defendants seek an order striking Plaintiffs' Request to Clerk to Enter Default.

SUPPORTING MEMORANDUM

I. ISSUES PRESENTED.

A. Whether a request for entry of default under Rule 55(a) of the Federal Rules of Civil Procedure¹ should be stricken where the affidavits and other material submitted by the Plaintiffs establish that the Swiss Defendants were not served in accordance with the requirements of the Foreign Sovereign Immunities Act.

B. Whether a request for entry of default under Rule 55(a) should be stricken where the request is filed before the Swiss Defendants' time to respond to the Complaint has expired.

C. Whether a request for entry of default should be stricken where the Court lacks subject matter over the case because the Swiss Defendants have sovereign immunity, and where the action is barred by the Act of State Doctrine.

D. As to Defendants Gerard Sautebin and Brent Holtkamp, whether a request for entry of default also should be stricken where the Court lacks personal jurisdiction over the individual Defendants.

II. STATEMENT OF FACTS.

As described in further detail in the Swiss Defendant's motion to dismiss the Complaint, filed concurrently, Plaintiffs in this action have sued the federal government of the nation of Switzerland and two Swiss government officials. Plaintiffs have purported to serve the complaint under the Hague Convention of the Service Abroad of Judicial and

¹ Unless otherwise indicated, all references to Rules are to the Federal Rules of Civil Procedure.

1 Extrajudicial Documents in Civil and Commercial Matters ("The Hague Convention").²
 2 Under Article 6 of the Hague Convention, proof of service is evidenced by a certificate
 3 issued by the Central Authority of the country in question. No certificate has been issued in
 4 this case.

5 On July 18, 2007, Plaintiffs submitted to the Court a Status Report Re Letter from
 6 Swiss Ambassador in the United States, which included a copy of the Ambassador's letter
 7 and Plaintiffs' reply. Case 3:07-cv-02782-WHA, Documents 11, 12, 12-2, 12-3. These
 8 materials establish that on July 5, 2007, in accordance with the provisions of Article 4 of
 9 the Hague Convention, the Swiss Ambassador informed plaintiffs that their purported
 10 service was ineffective under the Hague Convention, and that the papers were being
 11 returned to plaintiffs. Letter of Swiss Ambassador to Oliver and Hana Hilsenrath, Case
 12 3:07-cv-02782-WHA, Document 12-3. Instead of correcting the deficiencies in service that
 13 had been specifically identified in the Ambassador's letter, Plaintiff's reply letter stated
 14 their refusal to do so. Case 3:07-cv-02782-WHA, Document 12-2. On August 3, 59 days
 15 later, plaintiffs filed the Request to Clerk to Enter Default ("Request"). The Request is
 16 patently defective and should be stricken.

17 **III. ARGUMENT.**

18 **A. The Request Should Be Stricken Because Plaintiffs Have Not Shown By** 19 **Affidavit Or Otherwise That They Have Served Defendants With The** 20 **Complaint.**

21 Rule 12(a) provides that a defendant shall serve an answer or other response within
 22 specified time periods after being served with the summons and complaint. Under 28
 23 U.S.C. section 1608(d), foreign nations have 60 days after service of the summons and
 24 complaint to file a responsive pleading. A defendant who has not been served with a
 25 summons and complaint need not file an answer or other response.

27 ² A copy of the Hague Convention is an appendix to Rule 4 and is Exhibit 5 to the Request
 28 for Judicial Notice in Support of the Swiss Defendants' motion to dismiss.

1 Rule 55(a) provides:

2 When a party against whom a judgment for affirmative relief is sought has
3 failed to plead or otherwise defend as provided by these rules and that fact is
4 made to appear by affidavit or otherwise, the clerk shall enter the party's
5 default.

6 Plaintiffs filed no affidavit in support of their request for entry of default, but even if the
7 Court were to consider Plaintiff's Status Report as appropriate support, that document does
8 not include a certificate of service under Article 6 of the Hague Convention, and indeed
9 establishes that the Swiss Defendants have not been served. Plaintiffs' attempt at service
10 was patently defective. As discussed in detail in the Swiss Defendants' motion to dismiss,
11 but apparent from the Status report itself, Plaintiffs failed to provide translations of the
12 summons and other submitted documents (except for a partial and unintelligible translation
13 of the Complaint), failed to effect service through a court or other official, and failed even
14 to provide sufficient copies to serve each defendant. Plaintiffs have provided no
15 justification for failing to make any attempt to correct those deficiencies and properly serve
16 the Swiss Defendants. Accordingly, the Swiss Defendants' time for responding to the
17 Complaint has not even commenced to run, much less expired.

18 Accordingly, Plaintiffs' Request does not comply with Rule 55(a) and should be
19 stricken.

20 **B. The Request for Entry of Default Should Be Stricken Because By Any**
21 **Measure The Time For Defendants To Respond To the Complaint Had**
22 **Not Passed.**

23 As discussed in Section A above, Plaintiffs' own court submissions establish that
24 they have failed to serve the Complaint at all. However, even if Plaintiffs' claim that they
25 served the Complaint on June 4 were correct, the request for default should be stricken
26 because it was premature. Based on a June 4 service date, the Swiss Defendants would
27 have 60 days to respond to the Complaint, or through August 3, 2007. Plaintiffs' August 3
28 filing was made before by Plaintiff's own measure the Swiss Defendants could be found in
default.

C. The Request For Entry Of Default Should Be Stricken Because This Court Lacks Subject Matter Over This Action And Because Plaintiffs' Action Is Barred By The Act Of State Doctrine.

The Court lacks subject matter jurisdiction over this action because the Swiss Defendants are immune from jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"). Where as here defendants are a foreign state and its agents, the FSIA presumes immunity. Security Pac. Nat'l Bank v. Derderian, 872 F.2d 281, 285 (9th Cir. 1989). See Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102-06 (9th Cir. 1990) (government officials sued as individuals for their official acts are immune under 28 U.S.C. section 1603(b)). Here, no exception to sovereign immunity exists.

In addition, the Act of State Doctrine precludes this Court from inquiring into the Swiss government's conduct of its criminal investigation of Oliver Hilsenrath, including its order freezing his assets. Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1347 (9th Cir. 1997).

These issues are discussed in detail in the Swiss Defendants' motion to dismiss, which discussion will not be repeated here. These bars to this Court's exercise of jurisdiction over this case provide a further and compelling basis for striking plaintiffs' Request.

D. The Request For Entry Of Default Should Be Stricken As to Gerard Sautebin and Brent Holtkamp Because The Court Lacks Personal Jurisdiction Over Them.

As discussed in the Swiss Defendants' motion to dismiss, Messrs. Sautebin and Holtkamp lack minimum contacts with the United States and California to support the exercise of jurisdiction over them. They have no assets here or other contacts with this forum which would justify the exercise of personal jurisdiction over them. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985). The lack of personal jurisdiction over these individuals provides an independent basis for striking Plaintiffs' Request as to them.

1 IV. CONCLUSION.

2 For the foregoing reasons, the Court should strike Plaintiffs' Request to Clerk to
3 Enter Default.

4 Dated: August 6, 2007.

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